

STATE OF MICHIGAN  
COURT OF APPEALS

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ALFRED L. RIDDLE,  
  
Plaintiff-Appellee,

UNPUBLISHED  
December 15, 2009

v

No. 286395  
Calhoun Circuit Court  
LC No. 2007-002064-CH

EVERHOME MORTGAGE COMPANY,  
  
Defendant-Appellant,

and

TROTT & TROTT, P.C.,  
  
Defendant.

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Before: Beckering, P.J., and Cavanagh and M.J. Kelly, JJ.

PER CURIAM.

Defendant Everhome Mortgage Company appeals as of right the trial court's order that voided and set aside the sheriff's sale of plaintiff Alfred L. Riddle's property. Plaintiff's property was sold in a sheriff's sale after he failed to pay escrow and other amounts due. We reverse and remand.

I

Defendant first argues that it was entitled to summary disposition pursuant to MCR 2.116(C)(8) because the complaint filed by plaintiff to initiate this action contained a different description of the property than found in the mortgage and sheriff's sale deed and the mortgage was not attached to the complaint. Defendant also argues that because plaintiff defaulted on the mortgage according to its terms, summary disposition was appropriate pursuant to MCR 2.116(C)(10), as there was no genuine issue of material fact. In addition, because plaintiff did not respond to defendant's motion, he failed to identify a genuine issue of material fact by admissible documentary evidence.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. See *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Dolan v Continental Airlines*, 454 Mich 373, 380; 563 NW2d 23 (1997). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). However, "the mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade, supra* at 163. When an action is based on a written contract, a copy of the contract generally must be attached to the complaint, and it becomes part of the pleadings and may be considered in deciding a motion for summary disposition based on the failure to state a claim. MCR 2.113(F); *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Coblentz, supra* at 568. A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In evaluating a motion for summary disposition brought under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties. MCR 2.116(G)(5). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his or her position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b), (4); *Coblentz, supra* at 569. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, MCR 2.116(G)(4); *Coblentz, supra*, and the factual issue in dispute must be material to the dispositive legal claims, *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). Also, the existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden, supra* at 121, 124 n 6.

Contract interpretation is a question of law, which is reviewed de novo on appeal. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). This state's courts

. . . enforce contracts according to their terms, as a corollary to the parties['] liberty to enter into a contract. We examine contractual language and give the words their plain and ordinary meanings. An unambiguous contractual provision reflects the parties['] intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." Courts may not create ambiguity when contract language is clear. Rather, this Court must honor the parties' contract, and not rewrite it. [*Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664-665; 770 NW2d 902 (2009) (citations omitted).]

Finally, because the trial court's decision is predicated on the notion of waiver, we noted that "[w]aiver is a mixed question of law and fact. The definition of a waiver is a question of

law, but whether the facts of a particular case constitute a waiver is a question of fact. A trial court's findings of fact are reviewed for clear error." *Sweebe, supra* (citations omitted).

The complaint alleged that the property at issue was located in the Northwest ¼ of the Northwest ¼ of Section 21, instead of the Northeast ¼ of the Northeast ¼ of Section 20, and in Range 5 West, rather than in Range 4 West. We find that these errors were not clerical errors. See MCR 6.435(A). However, only considering the evidence that had been presented at that point in the proceedings and based on the fact that defendant did not appear to be unclear as to the property that the complaint sought to describe, we find that the description of the premises in the complaint was sufficiently clear to identify the premises. See MCR 3.411(B)(1)(c). In addition, a correct factual development could have possibly justified recovery; thus, the granting of a motion pursuant to MCR 2.116(C)(8) would not have been proper on this ground. See *Wade, supra* at 163.

However, we find that the theory alleged in plaintiff's complaint was based on a written instrument, i.e., the note and mortgage. Accordingly, the note and mortgage needed to be attached to the complaint. See MCR 2.113(F). Because plaintiff failed to append this documentation to his complaint, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(8). The trial court erred in reaching a contrary conclusion.

With regard to defendant's request for summary disposition pursuant to MCR 2.116(C)(10), a party is not required to serve a responsive pleading to a motion for summary disposition. MCR 2.110(B); MCR 2.116(G)(1)(a)(ii). MCR 2.116(G)(4) provides, however:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Here, defendant supplied with its motion the note, mortgage, and letters from defendant to plaintiff outlining the default. Plaintiff's presentation of only his verified complaint failed to carry his burden of setting forth specific facts showing that there was a genuine issue for trial. See MCR 2.116(G)(4). Thus, summary disposition under MCR 2.116(C)(10) was appropriate. The trial court erred in ruling to the contrary.

In addition, the trial court incorrectly decided that there was a genuine issue of material fact about whether there was a waiver of plaintiff's contractual obligation to pay the full monthly payment amount. "Waiver is the intentional relinquishment of a known right." *Weller v Manufacturer's Life Ins Co*, 256 Mich 532, 536; 240 NW 34 (1932). The plain language of the mortgage clearly provides that plaintiff must pay directly to the lender principal, interest, and the amounts required for the escrow account, which included taxes; that the lender accepting less than full payment does not constitute a waiver of any of the lender's rights; that plaintiff must pay the lender the funds for escrow items unless the lender waives plaintiff's obligation to pay this money directly to the lender; and that any such waiver must be in writing. See *Reicher, supra*. There was no written waiver. Moreover, the trial court even noted that the allegations in

the complaint support a reasonable inference that plaintiff did not pay the escrow amount. Thus, viewing the evidence in the light most favorable to plaintiff, there was no genuine issue of material fact about waiver or about whether plaintiff made the payments of principal, interest, and escrow to the lender as required by the mortgage. Summary disposition for defendant was appropriate. See *Coblentz, supra* at 567-568. The trial court erred when it failed to grant summary disposition in favor of defendant.

## II

Defendant next argues that its motion for a directed verdict should have been granted because plaintiff never proved that he paid the mortgage including the escrow portion; therefore, he failed to meet his burden. We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review all the evidence presented up to the time of the motion to determine whether a question of fact existed. *Silberstein v Pro-Golf of America, Inc.*, 278 Mich App 446, 455; 750 NW2d 615 (2008). In reviewing a trial court's ruling on a motion for a directed verdict, we must examine the evidence presented in the light most favorable to the nonmoving party and grant that party every reasonable inference and resolve any conflict in the evidence in the nonmoving party's favor. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

We conclude that defendant's motion for a directed verdict should have been granted because no factual question existed on which reasonable minds could differ. *Smith v Foerster-Bolser Constr, Inc.*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). The plain language of the mortgage was clear as set forth above and Riddle admitted that he did not pay the amounts demanded by defendant in the September, October, November or December letters. See *Reicher, supra*. Consequently, we conclude that the trial court erroneously denied defendant's request for a directed verdict.

## III

Finally, defendant argues that the elements of equitable estoppel were not met; therefore, the trial court incorrectly set aside the sheriff's sale and deed. Equitable estoppel issues are reviewed de novo. *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005). However, the trial court's factual findings will not be reversed unless they were clearly erroneous. *Id.* An equitable estoppel arises when: (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe alleged facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of those alleged facts. *Id.* Here, there was no equitable estoppel because defendant did not by representation, admissions, or silence intentionally or negligently induce plaintiff to believe that there would not be a sheriff's sale. The correspondence from defendant indicated that plaintiff was not making the required payments, that he was in default, and that there was going to be a sheriff's sale if plaintiff did not bring his account current. Plaintiff never brought his account current. Thus, there was no representation, admissions or silence intentionally or negligently inducing plaintiff to believe that there would not be a sheriff's sale. Accordingly, the trial court erred in setting aside the sheriff's sale pursuant to the principles of equitable estoppel.

Reversed. Remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh

/s/ Michael J. Kelly